CAVEAT:

THE FOLLOWING MOTION OF PETITIONER TO FILE A REPLY BRIEF OUT-OF-TIME WAS DENIED BY THE COURT ON NOVEMBER 7, 1983 (52 L.W. 3369), BUT IS REPRODUCED HEREIN IN THE INTEREST OF COMPLETENESS.

MOTION FILED
OCT 28 1983

CASE NO 82-940

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

ELIZABETH ANDERSON HISHON,

Petitioner,

vs.

KING & SPALDING

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

MOTION OF PETITIONER TO FILE REPLY BRIEF OF PETITIONER

Elizabeth Anderson Hishon, the petitioner in the above-styled action, respectfully moves the Supreme Court for leave to file the Reply Brief of Petitioner, 40 copies of which have been lodged with the Clerk of the Supreme Court.

In support of this motion, the petitioner respectfully shows the Court the following:

1.

Oral argument in this action is scheduled for October 31, 1983.

2.

On October 24, 1983, Cockle Printing Company of Omaha, Nebraska, deposited 40 copies of the Reply Brief of Petitioner in a United States post office, with first-class postage,

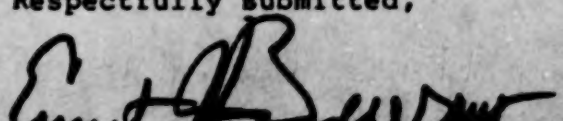
prepaid, and properly addressed to the Clerk of the Supreme Court. A true and correct copy of the Certificate of Service of Cockle Printing Company is attached hereto as Exhibit "A." On the same date, the undersigned, a member of the Bar of the Supreme Court, executed an Affidavit certifying that to the best of his knowledge Cockle Printing Company had mailed 40 copies of the Reply Brief of Petitioner on October 24, 1983. A true and correct copy of the Affidavit is attached hereto as Exhibit "B."

3.

On October 26, 1983, Ms. June Hoffman of the Clerk's office informed the undersigned that 40 copies of the Reply Brief of Petitioner had been received on that date and had been lodged with the Court. Ms. Hoffman further informed the undersigned that the 40 copies of the Reply Brief of Petitioner could not be accepted for filing without leave of Court.

WHEREFORE, the petitioner respectfully prays that her motion for leave to file the Reply Brief of Petitioner be granted.

Respectfully submitted,



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I, Linda Chloupek , of lawful age, being duly sworn, upon my oath state that I did, on the 24 day of October , 1983 , place in the U.S. Post Office at Omaha, NE 2 package containing 3 printed copies of Reply Brief of Petitioner in the following case:

No. #82-940
Elizabeth Anderson Hishon, Petitioner,
vs.
King & Spalding, Respondent.

that the proper postage was affixed to said envelope(s) and that they were plainly addressed to the following:

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Linda Chloupek
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Subscribed and sworn to before me this 24 day of October 19 83
I am duly authorized under the laws of the State of Nebraska to admin ister oaths.

GENERAL NOTARY State of Nebraska
PATRICIA L. HILLCOTT
My Comm. Exp. Nov. 24, 1984

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EXHIBIT A

CASE NO. 82-940

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ELIZABETH ANDERSON HISHON,

Petitioner,

vs.

KING & SPALDING

Respondent.

A F F I D A V I T

STATE OF GEORGIA:
:
COUNTY OF FULTON:

I, EMMET J. BONDURANT, being first duly sworn on oath, depose and state that I am a member of the Bar of the United States Supreme Court and that on the 24th day of October, 1983, Cockle Printing Company filed the Reply Brief of Petitioner for the above-referenced case within the time limits permitted by the Supreme Court Rules by mailing the original and appropriate copies of the same by U.S. Mail, postage prepaid.

EMMET J. BONDURANT

Sworn to and subscribed
before me this 24th day
of October, 1983.

NOTARY PUBLIC
Notary Public, Georgia, State at Large
My Commission Expires Sept. 7, 1986

[NOTARIAL SEAL]

EXHIBIT B

CERTIFICATE OF SERVICE

I, Emmet J. Bondurant, do hereby certify that I have this day served the within and foregoing Affidavitby mailing copies thereof to counsel of record in envelopes properly stamped and addressed as follows:

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Attorneys for Respondent, King & Spalding

This 24th day of October, 1983.

Emmet J. Bondurant

CERTIFICATE OF SERVICE

I, Emmet J. Bondurant, do hereby certify that I have this day served counsel of record for the foregoing matter with a copy of the within Motion of Petitioner to File Reply Brief of Petitioner by depositing a copy of same in the United States mail in a properly addressed envelope with adequate postage thereon to:

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Washington, D.C. 20530

This 27th day of October, 1983.

EMMET J. BONDURANT

No. 82-940

In The
Supreme Court of the United States
October Term, 1983

ELIZABETH ANDERSON HISHON,

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vs.

KING & SPALDING,

Respondent.

On Certiorari To The
United States Court of Appeals
For the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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No. 82-940

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On Certiorari To The United States Court of Appeals For the Eleventh Circuit

REPLY BRIEF OF PETITIONER

King & Spalding has made five basic arguments in support of its claim for exemption from Title VII's otherwise comprehensive ban on employment discrimination.[1]

[1] King & Spalding has made an additional sixth argument that *certiorari* should be dismissed as having been improvidently granted.

ARGUMENT

I.

Outlawing Employment Discrimination By Law Firms Will Not Destroy The Independence Of The Bar

King & Spalding's principal argument is that, because members of the private bar often function as "advocates" in representing clients against the government, "lawyers must be free from private and governmental pressures . . . to accept unacceptable [*i.e.*, women] lawyers as partners." *Respondent's Brief* at 6. To sustain Title VII jurisdiction over law firms, the argument continues, would subject law firms not only to the hazard of suits by former associates, but would also make law firms potentially liable for discrimination suits by the EEOC, which King & Spalding describes as "a politically appointed advocacy agency of the Government." *Id.* at 7. Such suits, King & Spalding argues, would "create the appearance of a conflict between defense of [the law firm's] clients and defense of [the firm] because the EEOC is [often] a party-plaintiff in actions against clients of [King & Spalding]." *Id.*

King & Spalding's argument is untenable. It is specious to argue that the professional competence or independence of the Bar depends upon an exemption of law firms and the legal profession from legislation prohibiting employment discrimination.[2] Lawyers and law firms

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[2]Although King & Spalding has not argued directly that sex, race, religion or national origin are bona fide occupational qualifications for the legal profession, King & Spalding subtly implies that the role of lawyers as "advocates" would be diminished, their ability to "defend the rights of American citi-

(Continued on next page)

are not and never have been above the law. Indeed, law firms already have been held subject to investigation and suit by the EEOC. *See, e. g., EEOC v. Rinella & Rinella,* 401 F. Supp. 175 (N. D. Ill. 1975).

Moreover, law firms no less than their clients have long been subject to investigation and enforcement actions by a large number of other government agencies. For example, partnerships, including law partnerships, are required to file federal partnership tax returns. I.R.C. § 6031 (1983). Partnership records, as well as those of individual partners, are also subject to being audited and subpoenaed by the IRS. *See, e.g., Bellis v. United States,* 417 U. S. 85 (1974). It cannot be seriously argued that requiring members of the tax bar to file federal tax returns and subjecting them to IRS audits creates a conflict of interest or makes it impossible for the entire tax bar to represent clients in tax cases in a fearless, independent, professional manner. Law firms have also been subjected to enforcement actions by other agencies of the Executive Department, with whom they regularly litigate on behalf of clients, including the SEC [*Securities & Exchange Commission v. National Student Marketing Corp.,* 538 F. 2d 404 (D.C. Cir. 1976), *cert. denied,* 429 U. S. 1073 (1977)], the NLRB [*Kleinberg, Kaplan, Woolff, Cohen & Burrows, P.C.,* 253 N.L.R.B. 450 (1980); *Stroock & Stroock & Lavan,* 253 N.L.R.B. 447 (1980); *Foley, Hoag & Eliot,* 229 N.L.R.B. 456 (1977); *Wayne County Neighborhood Legal Services, Inc.,* 229 N.L.R.B. 1023 (1977)],

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(Continued from previous page)

zens" would suffer, and the professional standards of private law firms would be degraded, if law firms were forced "to accept unacceptable [*i. e.,* women, black and Jewish] lawyers as partners." *Respondent's Brief* at 6.

and the Antitrust Division of the Justice Department [*United States v. Buzzard*, 540 F. 2d 1383 (10th Cir. 1976), *cert. denied*, 429 U. S. 1072 (1977); *United States v. Allen County Indiana Bar Association, Inc.*, No. F 79-0042 (N.D. Ind. Oct. 7, 1980) (consent decree)]. There is no evidence that the fact that lawyers may be subject to investigation by any of those agencies has made the Bar subservient or timid or has otherwise impaired the independence of lawyers to function as vigorous advocates before or against the same agencies.

II.

King & Spalding Has No First Amendment Right To Discriminate In The Selection Of Partners Or To Be Free From Involuntary Association With Women Or Minorities In The Practice Of Law

King & Spalding argues, apparently seriously, that it has both a First Amendment and due process right of "freedom of association [that] necessarily includes the right to select" the lawyers who will be admitted to partnership and thus permitted to "constitute the associational group." *Respondent's Brief* at 17. In essence, King & Spalding is claiming that the male partners have a constitutional right not to associate with women in the practice of law, and that Title VII is, therefore, unconstitutional as applied to King & Spalding's partnership decisions.

The First Amendment, however, protects the right of freedom of association only to the extent of guaranteeing the right of persons to join together "to pursue goals independently protected by the first amendment,"[3]

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[3] L. Tribe, *American Constitutional Law* § 12-23, at 702 (1978).

and does not include the right to prevent others from sharing in educational or job opportunities. The First Amendment protects the right of association for the purpose of engaging in political speech [*Branti v. Finkel*, 445 U. S. 507 (1980)], political advocacy [*Cousins v. Wigoda*, 419 U. S. 477 (1975)], and religious worship [*Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U. S. 696 (1976)]. *See also Buckley v. Valeo*, 424 U. S. 1 (1976) (political speech); *NAACP v. Alabama ex rel. Patterson*, 357 U. S. 449, 460 (1958) ("association for the advancement of beliefs and ideas"); *Sweezy v. New Hampshire*, 354 U. S. 234 (1957) (political expression). *Compare Garcia v. Texas State Board of Medical Examiners*, 384 F. Supp. 434 (W. D. Tex. 1974), *aff'd mem.*, 421 U. S. 995 (1975) (summarily affirming a decision that rejected a claim by consumers that they had a "freedom of association" right to form a consumer-controlled pre-paid health plan organization).

The right of freedom of association cannot be used to shield acts of invidious discrimination from being outlawed by Title VII or other antidiscrimination legislation. White children do not have a constitutional "right" to be free from association with black children in public schools. Protestant workers do not have a constitutional "right" to be free from association with Catholics or Jews in the workplace. And male lawyers who hold the dominant positions as partners in the Nation's most prestigious law firms do not have a constitutional right arbitrarily to exclude equally well-qualified lawyers who happen to be women from partnership because the existing partners would be "more comfortable" practicing law with men.

In *Runyon v. McCrary*, 427 U. S. 160 (1976), this Court rejected similar freedom of association claims that were asserted on behalf of white children in private schools. Rejecting the contention that any right of freedom of association would be violated if black children were allowed to attend the same schools, the Court stated:

> In *NAACP v. Alabama*, 357 U. S. 449, and similar decisions, the Court has recognized a First Amendment right "to engage in association for the advancement of beliefs and ideas . . . ." *Id.*, at 460. That right is protected because it promotes and may well be essential to the "[e]ffective advocacy of both public and private points of view, particularly controversial ones" that the First Amendment is designed to foster. *Ibid.* See *Buckley v. Valeo*, 424 U. S. 1, 15; *NAACP v. Button*, 371 U. S. 415.
>
> From this principle it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle. As the Court stated in *Norwood v. Harrison*, 413 U. S. 455, *"the Constitution . . . places no value on discrimination," id.*, at 469, *and while "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment . . . it has never been accorded affirmative constitutional protections.* And even some private discrimination is subject to special remedial legislation in certain circumstances under § 2 of the Thirteenth Amendment; Congress has made such discrimination unlawful in other significant contexts." *Id.*, at 470. In any event, as the Court of Appeals noted, "there is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way

the teaching in these schools of any idea or dogma." 515 F. 2d, at 1087.

Id. at 175-76 (emphasis supplied).

See, e. g., United States v. International Longshoremen's Association, 460 F. 2d 497, 501 (4th Cir.), *cert. denied,* 409 U. S. 1007 (1972) (rejecting "freedom of association" as a defense for segregated locals based on the workers' alleged rights to freedom of association); *United States v. Jacksonville Terminal Co.,* 451 F. 2d 418, 457 (5th Cir. 1971), *cert. denied,* 406 U. S. 906 (1972) (ordering the consolidation of segregated locals because "locals are not mere 'social clubs'"); *Lucido v. Cravath, Swaine & Moore,* 425 F. Supp. 123, 129 (S. D. N. Y. 1977) ("[T]he court does not recognize any First Amendment privacy or associational rights for a commercial, profit-making business organization of the nature of the Cravath partnership.").

III.

Employment Discrimination By Law Firms Will Not Be Remedied By Father-Daughter Relationships

King & Spalding accuses petitioner of relying on "inaccurate stereotypes [and] inaccurately assum[ing] that discrimination against women lawyers is widespread...." *Respondent's Brief* at 8. King & Spalding points to the fact that an increasing number of partner-fathers have daughters who have become lawyers and that such fathers would not tolerate discrimination against women by their law firms. *Id.* at 37. King & Spalding also claims that the economic self-interest of law firms will cure any remaining problems of discrimination in the legal profession. *Id.* at 35-37.

Even if one accepts the premise that those partners in large law firms who have daughters who are either attending law school or are admitted to the Bar will not support discrimination against their children, such nepotism is hardly a reason for exempting law firms from Title VII. A much larger number of other partners in law firms will not be similarly constrained from discriminating against women; nor will paternalism help blacks, Jews and other minorities, whose fathers are not partners in the major law firms, gain access to employment opportunities in the private bar.[4]

Moreover, the statistics cited by King & Spalding (*Respondent's Brief* at 33 n. 52) demonstrate that female associates are far less likely to make partner than male associates, despite the increasing numbers of women graduating from law schools and entering the private practice. While statistics cited by King & Spalding show that the *percentage increases* in the number of female partners

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[4]King & Spalding acknowledges that "minority law school graduates are less likely than their non-minority counterparts to enter private practice and [that] a number of large firms have no black or Hispanic attorneys . . ." *Respondent's Brief* at 35. The respondent fails, however, to explain why higher percentages of minority lawyers are forced to enter government service than their non-minority classmates. The reasons are obvious. Women and minority lawyers enter government employment in greater percentages than their male and non-minority counterparts because of employment discrimination by law firms. (*See, e.g.*, Curran, *The Legal Profession in the 1980's: The Changing Profile of the Legal Profession* 13 (1982) (paper presented by the Associate Executive Director of the American Bar Foundation at ABA 1983 Annual Meeting) (Among new entrants between 1975 and 1980, 57% of women were in private practice as compared to 72% of men). For many minority lawyers, government service or legal aid programs are the only job opportunities available.

have been greater than the percentage increases in the total number of partners in the 50 largest law firms surveyed by the National Law Journal, the same statistics reflect that over a three-year period, nine males became partners for every female who became a partner.

While King & Spalding argues that the economic self-interest of law firms will be a sufficient guarantee that the major firms will not discriminate against women and other minorities (*Respondent's Brief* at 36-38), history teaches an opposite lesson. Discrimination against women, blacks, and religious minorities is rooted in bigotry, not economics, and cannot be defended on the basis of logic or enlightened self-interest. Racial, religious, and sexual discrimination has always been economically counterproductive, not only for the victims, but also for the most ardent practitioners. For example, it was economically counterproductive for the owners of the Heart of Atlanta Motel to maintain vacant rooms rather than to admit blacks. They, however, stubbornly spent thousands of dollars in defense of their "right" to discriminate against blacks even though that discrimination was both illegal and contrary to their economic self-interest. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

In the final analysis, Congress, and not the Court, is the judge of whether economic self-interest or moral suasion is a sufficient deterrent to employment discrimination. Congress enacted the 1964 Civil Rights Act precisely *because* it determined that racial, religious, and sexual prejudice was deeply rooted, and that strong legislation, not economic incentives, was required if discrimination in public accommodations and employment was to end.

IV.

The Legislative History Of Title VII Supports Coverage Of Partnership Decisions Of Law Firms

King & Spalding argues that, because the legislative history of the 1964 Civil Rights Act does not reflect explicit consideration by Congress of the precise issue of discrimination by law firms in the selection of partners, the Court should presume that Congress intended to exclude partnership decisions of law firms from the coverage of Title VII.

King & Spalding's argument runs counter to the admonition in *County of Washington v. Gunter*, 452 U. S. 161, 178 (1981), that courts "must . . . avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate." King & Spalding's argument is also flawed for a number of other reasons.

First, Congress did not, as King & Spalding's argument implies, overlook partnerships in defining the coverage of Title VII. To the contrary, Congress treated partnerships and corporations equally and included both within the definition of a "person" who would be considered an "employer" covered by Title VII. § 701(a)(b), 42 U.S. C. § 2000e(a),(b). Moreover, when Congress decided to exempt a particular organization or activity from Title VII, it did so, not by implication, but by express exclusions in the Act.

Second, it is true, as King & Spalding points out in its brief, that one Senator (Norris Cotton of New Hampshire) equated the employment of workers by businesses

with fewer than 100 employees with the selection of a partner. *Respondent's Brief* at 49-50. From the remarks of a single Senator in support of an unsuccessful amendment to Title VII, King & Spalding leaps to the conclusion that everyone in Congress must have agreed with Senator Cotton that the selection of a partner was outside the coverage of Title VII. *Id.* King & Spalding, however, ignores the fact that Senator Cotton was arguing in favor of a proposal that would have restricted the coverage of Title VII to firms with 100 or more employees. His proposal was rejected by Congress, which adopted a much smaller (initially 25 or more employees) threshold for Title coverage.[5]

Third, King & Spalding makes much of the fact that lawyers comprised a majority of the members of Congress which enacted the 1964 Civil Rights Act. *Respondent's Brief* at 46-48. The firm argues that, "because a majority of the members of Congress were lawyers, their silence cannot be construed as reflecting an intention to include invitations to law partnerships within the scope of Title VII." *Id.* at 48. The firm asserts that the lawyers in Congress must have assumed that partnership decisions were so clearly outside the coverage of the Act that no discussion of the issue was necessary. *Id.*

To accept this argument, one would have to believe that a majority of the members of the Congress were

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[5]One could also conclude that a majority of Congress agreed with Senator Cotton that the selection of an employee in a small business of less than 100 " 'comes very close to selecting a partner' " (*Respondent's Brief* at 49), but concluded that these similarities were not a sufficient reason for exempting businesses with more than 25 (now 15) workers — however classified — from the coverage of Title VII.

hypocrites — that while Congress was publicly proclaiming its intention to "prohibit all practices in whatever form which create inequality of employment opportunity . . . [as] the 'highest priority' " [*Franks v. Bowman Transportation Co.*, 424 U. S. 747, 763 (1976)], and to "require[] 'the removal of artificial, arbitrary and unnecessary barriers to employment' and professional development that had historically been encountered by women and blacks as well as other minorities" [*Connecticut v. Teal*, 457 U. S. 440, 447 (1982)] — the lawyer members of Congress were silently carving out from Title VII's otherwise comprehensive prohibitions a special exemption for law firms which would allow them in their private law practices to commit the very acts of employment discrimination that they vocally condemned in all other businesses.[6]

Fourth, equally farfetched is the contention that the Congress which enacted the 1964 Act relied on the fact that the Court had "implied" that the practice of a learned profession is not "trade or commerce" [citing *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 786 n. 15 (1975)], and that Congress also relied on a snippet from Justice Holmes' 1922 opinion in *Federal Baseball* [*Federal Baseball Club of Baltimore, Inc. v. National League*, 259 U. S. 200, 209 (1922)], in which he argued that a law

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[6]King & Spalding also ignores the fact that Title VII has a specific exemption for the United States, including Congress. 42 U. S. C. § 2000e(b). If one were to accept King & Spalding's argument that lawyers in Congress successfully exempted their private law practices from Title VII, notwithstanding the absence of any evidence of congressional intent to do so, then a specific exemption for Congress itself also should have been unnecessary.

firm is not engaged in interstate commerce merely because a lawyer goes to another state to argue a case. *Respondent's Brief* at 52.[7]

The notion that the practice of a learned profession was not subject to regulation by Congress under the commerce clause had, however, been laid to rest before 1964. *United States v. Oregon State Medical Society*, 343 U. S. 326 (1952); *Goldfarb v. Virginia State Bar, supra.* Likewise, the Court's restrictive view of interstate commerce in *Federal Baseball* was an anachronism that had been repudiated in *United States v. South-Eastern Underwriters Association*, 322 U. S. 533 (1944), and *Wickard v. Filburn*, 317 U. S. 111 (1942), and effectively overruled in *Radovich v. National Baseball League*, 352 U. S. 445 (1957), as applied to all sports except baseball. *See Flood v. Kuhn*, 407 U. S. 258 (1972).

Fifth, in her opening brief, petitioner argued, based on *NLRB v. Hearst Publications*, 322 U. S. 111 (1944), *United States v. Silk*, 331 U. S. 704 (1947), and *Goldberg v. Whitaker House Cooperative, Inc.*, 366 U. S. 28 (1961), that the definitions of the terms "person," "employer" and "employee" in Title VII were similar to the original definitions of the same terms in the National Labor Relations Act [*Hearst*], the Social Security Act [*Silk*], and the Fair Labor Standards Act [*Goldberg*], and that Congress can be presumed to have been aware that in these cases this Court rejected narrow common-law definitions of the term "employee" in the earlier acts in favor of an

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[7] It is doubtful that even Justice Holmes would have ruled that a law firm such as King & Spalding, that has offices in Atlanta and Washington, was not engaged in interstate commerce.

economic reality test of employment. *Petitioner's Brief* at 28-29.

King & Spalding responded to this argument by correctly noting that, after the decisions in *Hearst Publications* and *Silk*, Congress had amended the applicable statutes to overrule the Court's expansive interpretation of the term "employment." King & Spalding's argument proves too much. In drafting the definitions of Title VII, Congress had several choices. Congress could have adopted the definitions of the original NLRA or SSA — knowing that those definitions had been given very broad interpretations by the Court under an economic reality test. Alternatively, Congress could have taken the opposite course and adopted the more narrow common-law concept of the term "employment" which Congress had enacted to overrule *Hearst Publications* and *Silk*. It is not without significance, therefore, that Congress chose the former course, and utilized essentially the same general definitions of "employment" that it had used in the initial versions of the earlier Acts, rather than the more restrictive language of the later amendments.

V.

EEOC Form 100 Does Not Support Respondent's Position

King & Spalding makes the misleading claim that "since 1966, the EEOC has interpreted Title VII to exclude partners from the definition of 'employee'....[T]he EEOC has said that an employee is 'any individual on the payroll of an employer who is an employer for purposes of the employer's withholding of Social Security taxes.'" *Respondent's Brief* at 57-58 (citing EEOC Standard Form 100).

EEOC Standard Form 100 is an "Employer Information Report" that was used by the EEOC and the U. S. Department of Labor Contract compliance programs to survey a select group of employers with more than 100 employees (and their affiliates). The definition of "employee" in the Form 100[8] does not purport to be an administrative interpretation of the term "employee" in § 701 of Title VII. Form 100 *excludes* a number of categories of workers who are undoubtedly "employees" for Title VII purposes. For example, Form 100 excludes "persons at a construction site whose employment relationship is expected to terminate with the end of the employee's work at the site, and persons temporarily employed in any industry . . . such as mariners, stevedores,

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[8] "Employee" means any individual on the payroll of an employer who is an employee for purposes of the employer's withholding of Social Security taxes except insurance salesmen who are considered to be employees for such purposes solely because of the provisions of Section 3121(d) (3)(B) of the Internal Revenue Code. The term "employee" SHALL NOT include persons who are hired on a casual basis for a specified time, or for the duration of a specified job, and work on remote or scattered sites or locations where it is not practical or feasible for the employer to make a visual survey of the work force within the report period; for example, persons at a construction site whose employment relationship is expected to terminate with the end of the employee's work at the site; persons temporarily employed in any industry other than construction, such as mariners, stevedores, waiters/waitresses, movie extras, agricultural laborers, lumber yard workers, etc. who are obtained through a hiring hall or other referral arrangement through an employee contractor or agent, or by some individual hiring arrangement; or persons on the payroll of a temporary service agency who are referred by such agency for work to be performed on the premises of another employer under that employer's direction and control."

1 Empl. Prac. Guide (CCH) ¶ 1881, at 1320-21.

waiters, waitresses . . . lumber yard workers. . . ." The definition in Form 100 is nothing more than a quick and simple guide to be used by employers in determining whether they are required to complete the form. Such a rule of thumb cannot be used to narrow the coverage of Title VII.[9]

VI.

The Timeliness Of Petitioner's Charge To The EEOC Turns On Disputed Issues Of Fact That Were Deferred By The Lower Court

Finally, King & Spalding argues that *certiorari* should be dismissed because "the record conclusively shows the Petitioner failed to comply with Title VII's 180-day limitations. . . ." *Respondent's Brief* at 70-73.

The short answer to the Respondent's argument is that the statute of limitations defense is not properly before the Court. The district court dismissed the complaint for failure to state a claim under Title VII.[10] Motion and

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[9]King & Spalding also cited Legal Interpretations of the EEOC's General Counsel, seemingly in support of its argument that the EEOC interpreted Title VII to exclude partners from the definition of employees. *Respondent's Brief* at 59-60. Although these Legal Interpretations merely state that "whether partners of the firm are 'employees' within the meaning of Title VII must be determined on a case-by-case basis" [EEOC, First Annual Digest of Legal Interpretations, July 1965-July 1966, § I(B)(5), at 6], King & Spalding failed to note that the Legal Interpretations "neither met nor were intended to meet the standards required of a 'written interpretation or opinion of the Commission' within the meaning of the Commission's procedural regulations" [29 C.F.R. §§ 1601.31-1601.33 (1980)], or of § 713(b) of Title VII, 42 U. S. C. § 2000e-12(b). 35 Fed. Reg. 18,692 (1970).

[10]The district court mischaracterized its ruling as a dismissal for want of "subject matter jurisdiction." *See Romero*

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affirmative defenses, including specifically King & Spalding's plea that the complaint was untimely, were deferred by the district court, with the consent of the parties, pending a ruling on the threshold issue of coverage under Title VII. Order of April 24, 1980; J. A. 86-87; *Hishon v. King & Spalding*, 678 F. 2d 1022, 1024 n. 3 (11th Cir. 1982).

Moreover, resolution of the 180-day defense involves disputed issues of fact. Mrs. Hishon filed a complaint with the EEOC on November 19, 1979. *Respondent's Brief* at 1. This was within 180 days after Mrs. Hishon was notified that she had been rejected for partnership by King & Spalding at its annual meeting in May 1979. King & Spalding argues, however, that it had also rejected her for partnership a year earlier, and that the firm merely "failed to reconsider" its decision in May 1979. It is common for law firms, including King & Spalding, to consider associates for partnership in successive years after the completion of minimum periods of employment (usually five to seven years). Some associates who are rejected for partnership at the end of their fifth year make partner the following year. Thus, the fact that an associate is "passed over" for partnership one year does not mean that the initial decision of the firm is final, or that the associate will not become a partner in the firm in a later year.

Multiple decisions by a law firm to reject an associate for partnership based on sex in successive years are separate acts of discrimination—a result that is not changed

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v. International Terminal Operating Co., 358 U. S. 354, 359 (1959) (" 'As frequently happens where jurisdiction depends on subject matter, the question of whether jurisdiction exists has been confused with the question whether the complaint states a cause of action.' " (quoting *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U. S. 246, 249 (1951)).

by claiming that the later decision is not a new act of discrimination, but merely a "failure to reconsider" an earlier discriminatory rejection. *See Griffin v. Big Spring Independent School District*, 706 F. 2d 645, 649 (5th Cir. 1983). Such decisions are not analogous to the grievance procedures referred to by Mr. Justice Powell in *dictum* in *Delaware State College v. Ricks*, 449 U.S. 250, 261 (1980).

CONCLUSION

King & Spalding has requested this Court to carve out from the coverage of Title VII a special exemption for lawyers and law firms, thereby allowing them to discriminate freely and arbitrarily in the decisions concerning advancement to the most lucrative positions in the legal profession. Its argument is not supported either by the legislative history of Title VII or prior decisions of this Court, and should be rejected.

As discussed above and in the petitioner's opening brief, the complaint stated a claim for sex discrimination. Therefore, the dismissal of the complaint for failure to state a claim was erroneous and should be reversed.

Respectfully submitted,

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